

Although, this time, the cover was even more transparent than a discussion of the merits of the PCS program.

40. Here, the student of the Commission's ex parte rules and practices must believe: that contacts are made with regard to the esoteric and antiseptic question of whether preferences should be abandoned retroactively; that this occurred without any discussion of the loss that would be visited upon these three parties as the tentative selectees of preference awards; that there would be no reference to their equities in prosecuting their proposals in the PCS docket with an expectation of a preference award; that these contacts were not intended to have any favorable influence on the Commission's staff toward finalization of the tentative awards to these three parties, who had beaten a path to the Commission's door for the past two years, at the expense of ACT and many other parties who played the game by the rules, filed papers in support of their preference claims, serving same on the other parties, and awaited the Commission's decision. And even if a separation could have been made between the abstract idea of abandoning the preference program and the private interests of the three tentative awardees who camped on the Commission's doorstep, what earthly reason did these parties have to make some 19 ex parte contacts in a period of less than two months, only to stop abruptly on December 22, 1993, the day before the announcement that there awards had become final?

41. There is a passage in the dissenting statement of

Commissioner Barrett to the Broadband Decision, 8 FCC Rcd. at 7857, that bears scrutiny on the subject of ex parte influence. The Broadband Decision was addressed to the merits of the PCS regulatory program. The decision on pioneer's preferences was scheduled to be issued later. Commissioner Barrett was addressing whether markets should be defined as Major Trading Areas (MTAs) or Basic Trading Areas (BTAs). He expressed concern that the Commission's Broadband Decision regarding the frequencies assigned to such areas would severely complicate making a decision on the pioneer's preference issue since the award of such frequencies might be excessive in the case of MTAs or inadequate in the case of BTAs. Commissioner Barrett expressed concern that in the latter situation, awards would be a fraction of the spectrum size which APC-Post, Cox and Omnipoint advocated, "in the lobbying efforts of the tentative pioneer preference designees." For sure, Commissioner Barrett did not miss the nexus between the substance of the PCS program and the private interests being advocated by these parties in their massive lobbying activities.

42. The ex parte rules require that a written report be filed concerning contacts that are made. 47 C.F.R. §1.1206(a)(2). That rule requires a written report which summarizes the "data and arguments" presented to the Commission. It is obviously intended to assure that all interested parties will be able to determine from these reports exactly what information and arguments have been presented to the agency ex

parte.

43. Perhaps these reports will dispel doubts concerning the nature of the contacts that were made during the period after the Broadband Decision was rendered and while the final decision on the preferences sought by APC-Post, Cox and Omnipoint was still pending. Perhaps these reports will clearly identify the subjects discussed and disclaim any discussion of the prohibited subjects. Perhaps these reports will show that the parties and the Commission have carried on unrestricted conversations, fully and openly disclosed, reflecting an unimpeachable compliance with and administration of the ex parte rules.

44. Perhaps not. We have attached as Appendix E copies of the "form" written reports of ex parte contacts made by APC-Post, Cox and Omnipoint during the months of November and December, following the Broadband Decision in October.<sup>4</sup> These "form" letters say that there was a discussion of the PCS docket proceeding...and nothing more. The PCS docket proceeding subsumed both the merits of the PCS program, dealt with in the Second Report and Order, supra, and the pioneer's preference matter, dealt with in the Third Report and Order, supra. The bare reference to the docket number provides no information concerning which of the subjects was discussed. There is no report of the "data" presented from which an understanding of the

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<sup>4</sup> Excluding only a small handful of letters providing more information, usually by attaching a copy of a fact sheet or position paper that was discussed.

substance of the discussion could be discerned. There is no report of the "arguments" presented from which the nature of the pitch to the government official could be discerned. There was no attempt to comply with the plain English language in the regulation.

45. Counsel for Pacific Bell, whose letters are attached as Appendices B and C, expresses confidence in the Commission's staff in their administration of the ex parte rules here. With all due respect to esteemed counsel and to the Commission, we do not share that confidence. There have been vastly too many contacts for all of them to be addressed to the merits of the substantive matters without being addressed to the preference claims as well. It is too difficult to separate the merits of the PCS regulatory program and the merits of the preference award for the Commission's adoption of the proposals of APC-Post, Cox and Omnipoint that are included in that regulatory program. It is even more difficult to separate the abstract question of a retroactive abandonment of the preference program for PCS pioneers when the three tentative selectees of the pioneers preferences for PCS are making the pitch.

46. No. This doesn't ring true. The repeated appearances of these parties, about as often as some hard-working government officials see their spouses, under such strange, unreal, contrived circumstances, has to have had a pernicious, lobbying

purpose and effect on the FCC officials. When you add to that mix the utter failure of the parties to file written reports summarizing the data and arguments that were made, submitting instead "form" letters which don't even purport to comply with the ex parte regulations, the evidence is compelling that no real effort was made either (a) to comply with or (b) to enforce those regulations.<sup>5</sup>

47. We are serving a copy of this petition on Mr. Fishel as notice of a claim of ex parte violations pursuant to 47 C.F.R. §1.1214.


48. We ask that the final award of preferences to APC-Post, Cox and Omnipoint be rescinded and set aside and that the prima facie matter of their apparent violation of the ex parte rules be designated for hearing in accordance with 47 C.F.R. §1.1216. Such hearing should be held before an independent master in light of the fact that officials of the Commission will be witnesses and that relevant documents must be produced from the

---

<sup>5</sup> The Commission is not above reproach for the administration of its ex parte regulations, which are designed so that all parties in interest in a given matter have fair disclosure of the nature and substance of communications addressed to the agency. See, Motion for Extraordinary Relief, filed February 22, 1994, relative to a report of the FCC's Inspector General, dated November 22, 1993, in re Press Broadcasting Company, Inc., Case No. 93-1867, United States Court of Appeals for the District of Columbia Circuit, and Order entered by the Court on March 4, 1994.

Commission's files.

Respectfully submitted,

  
\_\_\_\_\_  
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Counsel for Advanced  
Cordless Technologies, Inc.

March 7, 1994

APPENDIX A

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's  
Rules to Establish New  
Narrowband Personal  
Communications Services

)  
)  
)  
)  
)

GEN Docket No. 90-314  
ET Docket No. 92-300

RECEIVED

NOV 22 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION  
BY ADVANCED CORDLESS TECHNOLOGIES, INC.

1. Advanced Cordless Technologies, Inc. (ACT) petitions the Commission to reconsider its First Report and Order in the referenced proceeding, released July 23, 1993, insofar as the Commission there denied ACT's request for a pioneer's preference. 8 FCC Rcd. 7162, 7176, ¶82. This petition for reconsideration is timely filed within 30 days of issuance of the Commission's Second Report and Order in GEN Docket No. 90-314, released October 22, 1993, slip opinion FCC 93-451, which forms the basis for the petition.

2. The proceeding referred to in the caption relative to so-called narrowband personal communications services (narrowband PCS) was split off from consideration of the seminal PCS rulemaking proceeding in GEN Docket No. 90-314, which had been initiated in 1990. Notice of Inquiry, 5 FCC Rcd. 3995. ACT principal Matthew Edwards was formerly the President and Chief Executive Officer of Cellular 21, Inc., whose rulemaking petition filed in 1989 initiated the PCS regulatory program and who was



licensed in 1989 to operate two of the three initial experimental operations. 5 FCC Rcd. at 3995, ¶¶1, 8, fn. 7; also, Second Report and Order in GEN Docket No. 90-314, supra, at ¶1, fn. 3.

3. When the Commission split the narrowband rulemaking proceeding off from the seminal PCS proceeding, it placed requests for pioneer's preferences into two groups, one relatively small group for consideration in the narrowband proceeding and a much larger group for consideration in the seminal proceeding, which is sometimes referred to as the broadband proceeding. The pioneer's preference request of ACT was placed in the latter group, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd. 7794 (1992), for which final action has not yet been taken, see, Second Report and Order in GEN Docket No. 90-314, supra, at ¶6, fn. 6.

4. Nonetheless, when the Commission issued its First Report and Order in the narrowband rulemaking proceeding, to which the instant petition for reconsideration is addressed, it purported to take final action denying ACT's request for a pioneer's preference within the restrictive confines of the narrowband proceeding. Whatever may be said about the merits of the Commission's evaluation of ACT's contribution to matters finally decided in the narrowband proceeding, the Commission did not then have before it the matters finally decided in the seminal (broadband) proceeding for a complete evaluation of ACT's pioneering contribution to the PCS program. Until that is done, ACT cannot receive a full and fair evaluation, as was apparently

contemplated when the Commission placed ACT's pioneer's preference request in the group for consideration at or following the time of adoption of rules in the seminal (broadband) proceeding.

5. The Commission has now adopted such rules in the Second Report and Order in GEN Docket No. 90-314, supra. While the rules are still subject to petitions for reconsideration, and the final version of the rules will not be known for certain until later, out of an abundance of caution, ACT is filing the instant petition for reconsideration within 30 days of the release of the Second Report and Order. The text of that document makes reference to the pioneering role of Cellular 21, Inc. in the filing of the first petition which led to the PCS seminal rulemaking. For sure, ACT principal Matthew Edwards occupies that pioneering position relative to the PCS regulatory program including the so-called broadband rules no less than relative to the narrowband rules. There are also references to comments filed by ACT in various parts of the document, and we will shortly provide a more definitive analysis of ACT's contribution to the broadband rules as now announced, supplementing ACT's contribution to the narrowband rules. The Commission -- now, and for the first time -- can fully and fairly evaluate the pioneer's preference request of ACT.

6. For these reasons, ACT petitions the Commission to reconsider the First Report and Order in the captioned narrowband proceeding insofar as ACT's pioneer's preference request was

there denied, for the purpose of taking into account the role of  
ACT relative to the Second Report and Order in the seminal  
(broadband) proceeding as well.

Respectfully submitted,

  
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Counsel for Advanced Cordless  
Technologies, Inc.

November 22, 1993

CERTIFICATE OF SERVICE

I certify that copies of the foregoing PETITION FOR RECONSIDERATION BY ADVANCED CORDLESS TECHNOLOGIES, INC. are being sent by hand delivery or first class United States mail, postage prepaid, to the following:

Via Hand Delivery

Renee Licht, Esq.  
General Counsel  
Federal Communications Commission  
Suite 610  
1919 M Street, N.W.  
Washington, D.C. 20036

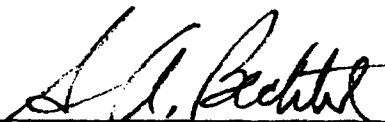
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Note: These parties include the final or tentative awardees of pioneer's preferences in the PCS regulatory program. A supplemental service will be made on other potentially interested parties and a supplemental certificate of service will be filed.



Gene A. Bechtel

ORIGINAL  
DOCKET FILE COPY ORIGINAL

NOV 23 1993

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Amendment of the Commission's )  
Rules to Establish New )  
Narrowband Personal )  
Communications Services )

GEN Docket No. 90-314  
ET Docket No. 92-100

To: The Commission

SUPPLEMENT TO  
PETITION FOR RECONSIDERATION  
BY ADVANCED CORDLESS TECHNOLOGIES, INC.

The petition for reconsideration filed yesterday, November 22, 1993, by Advanced Cordless Technologies, Inc. (ACT) is supplemented to furnish the attached supplemental certificate of service.

Respectfully submitted,



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Counsel for Advanced Cordless  
Technologies, Inc.

November 23, 1993

No. of Copies rec'd  
List ABCDE

CT4

SUPPLEMENTAL CERTIFICATE OF SERVICE

I certify that copies of the PETITION FOR RECONSIDERATION BY ADVANCED CORDLESS TECHNOLOGIES, INC. dated November 22, 1993 in GEN Docket No. 90-314, ET Docket No. 92-100, are being sent by first class United States mail, postage prepaid, this 23rd day of November 1993 to the following:

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APPENDIX B



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202-371-2791

January 26, 1994

Mr. Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
1919 M Street, NW -- Room 852  
Washington, D.C. 20554

Re: ET Docket No. 93-266, Review of the Pioneer's  
Preference Rules; Gen. Docket No. 90-314,  
Amendment of the Commission's Rules to Establish  
New Personal Communications Services

Dear Mr. Fishel:

I have been retained to represent Pacific Bell in the two above-referenced matters. I am writing this letter in anticipation of judicial review and pursuant to 47 C.F.R. § 1.1214, which imposes on all parties a duty to notify you whenever there is substantial reason to believe that a party may have violated the Commission's ex parte rules.

The portion of Gen. Docket No. 90-314 dealing with specific pioneer's preference awards is a restricted adjudicatory proceeding in which ex parte contacts are prohibited. Tentative Decision and Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 7794, 7813 (1992). One recipient of a pioneer's preference award in that proceeding -- American Personal Communications ("APC") -- reports having made 25 ex parte contacts in the days leading up to the announcement of the final awards on December 23, 1993.<sup>1</sup> In a letter memorializing one of its contacts, APC specifically notes that it made an ex parte presentation concerning "the pioneer preference portion of

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<sup>1</sup>See, e.g., Letters from Kurt A. Wimmer to William F. Caton (Nov. 2, 8, 17, 19, 23, and 24, 1993, and Dec. 1, 3, 6, 9, 10, 16, 17, 20, 1993) (memorializing between one and six contacts each).

KELLOGG, HUBER & HANSEN

Mr. Andrew S. Fishel

Page 2

January 26, 1994

Docket 90-314."<sup>2</sup> In another letter, APC contends that the participants did not discuss the "rulemaking issues" or "who should receive a pioneer preference."<sup>3</sup> Since these two exclusions cover everything at issue in Gen. Docket 90-314, however, it is unclear what issues APC did raise. The remaining letters do not indicate whether APC's presentations excluded the restricted portion of the proceeding.

In addition, Omnipoint Communications ("Omnipoint") sent the Commissioners a letter addressing the merits of its award while the award was still at issue. Letter from Omnipoint to the Commission 6 (Sept. 29, 1993) ("No other company, in any docket, was the subject of so many experimental reports. No other company besides Omnipoint . . . allowed its technology or innovations to be tested by the competing pioneers applicants for critique during the comment period" (emphasis omitted)). While 47 C.F.R. § 1.1202(b)(1) requires written communications to be served on the parties, Omnipoint's letter contains no indication that such service was made.<sup>4</sup>

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<sup>2</sup>Letter from Kurt A. Wimmer to William F. Caton (Nov. 2, 1993). The letter indicates that at least part of that discussion occurred in response to a question asked by the Office of the General Counsel. It does not indicate, however, whether the discussion was limited to answering that one question. In any event, the letter did not summarize the information given and was not served on the parties to the proceeding as required by 47 C.F.R. § 1.1204(b)(7) (note) ("In a restricted proceeding, . . . a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding").

<sup>3</sup>Letter from Jonathan D. Blake to William F. Caton (Sept. 29, 1993).

<sup>4</sup>APC and Cox Enterprises ("Cox") filed similar letters. See Letter from APC to the Commissioners (Sept. 27, 1993); Letter from Cox to the Commissioners (Sept. 28, 1993). Neither of those letters contains a proof of service clearly sufficient to satisfy 47 C.F.R. § 1.47, although APC and Cox did indicate on the signature pages of their letters that they had sent copies to all the parties in Gen. Docket No. 90-314.

KELLOGG, HUBER & HANSEN

Mr. Andrew S. Fishel

Page 3

January 26, 1994

Although ET Docket No. 93-266 is a non-restricted proceeding at least in part,<sup>5</sup> the disclosures made in that docket may have been inadequate as well. Under 47 C.F.R. § 1.1206(a)(2), any party making an oral ex parte communication must file a written memorandum summarizing the "data or arguments" presented if the data or arguments were not reflected already in the party's previous written filings in that proceeding. Because of the close nexus between these proceedings -- a portion of Gen. Docket No. 90-314 concerns which parties should receive pioneer's preferences, and a portion of ET Docket No. 93-266 involves whether parties who were tentatively awarded such preferences should retain them -- it is extremely important that the requirements of Section 1.1206(a)(2) be observed scrupulously here. Parties making ex parte contacts must list the subjects discussed and arguments presented to the extent they are not reflected in the party's previous written filings.

The three recipients of awards in Gen. Docket No. 90-314 all made ex parte contacts in ET Docket No. 93-266. Cox, which reports making four ex parte contacts in ET Docket No. 93-266 between November 3 and November 10, 1993, filed only summaries indicating that it discussed "outstanding issues in the Commission's Pioneer Preference Proceeding."<sup>6</sup> Because Cox had not yet filed any comments in ET Docket No. 93-266,<sup>7</sup> these discussions could not have been reflected in Cox's "previous" written filings. The letters offer no insight as to what

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<sup>5</sup>The Notice of Proposed Rule Making is ambiguous. In paragraph 23, it states that ET Docket No. 93-266 is "a non-restricted notice and comment rule making proceeding." Notice of Proposed Rule Making, Review of the Pioneer's Preference Rules, 8 FCC Rcd 7692, 7695 (1993). However, it also notes that "many pioneer's preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted . . . ." Ibid. If the words "these proceedings" is understood as including ET Docket No. 93-266, the Notice makes ET Docket No. 93-266 a restricted proceeding with respect to individual pioneer's preference requests.

<sup>6</sup>Letters from Werner K. Hertenberger to William F. Caton (November 3 (two letters), 4, and 10, 1993).

<sup>7</sup>Cox's comments in ET Docket No. 93-266 are dated November 15, 1993.

KELLOGG, HUBER & HANSEN

Mr. Andrew S. Fishel

Page 4

January 26, 1994

"arguments or data" were presented to support Cox's "position." Nor do they indicate what Cox's position was.

Omnipoint reports making 11 ex parte presentations in ET Docket No. 93-266 in just over a month. Each letter memorializing the contact states only that it concerned "Omnipoint's position with respect to the Commission's proposals."<sup>8</sup> In addition, Omnipoint's first four letters suffer from the same defect as Cox's: they fail to explain what arguments and data were used to support the party's "position" or what that position was -- even though Omnipoint, like Cox, had not filed any comments with the Commission at the time the ex parte contacts were made.<sup>9</sup>

Finally, APC reports making 30 ex parte contacts relating to ET Docket No. 93-266 during a roughly two-month period.<sup>10</sup> The memorandum memorializing three early contacts states that APC discussed "issues relating to the . . . docket."<sup>11</sup> Once again, however, no written filings had been made, so the discussions could not have been "reflected" in APC's previous filings within the meaning of Section 1.1206(a)(2).<sup>12</sup> Yet the letter, like many of APC's letters, offers no insight as to what was discussed or the arguments or data offered. APC also filed a Request for

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<sup>8</sup>Letters from Mark J. Tauber to William F. Caton (Nov. 1, 2, 3, 17, and 30, and Dec. 1, 2, 3, 1993).

<sup>9</sup>The first four letters (two of which are dated November 2, 1993) concern contacts made between November 1 and November 3, 1993. Omnipoint's comments were filed November 15, 1993, and the remaining contacts took place after that date.

<sup>10</sup>The letters listed in note 1, *supra*, which cited both Gen. Docket No. 90-314 and ET Docket No. 93-266, memorialize 25 of those contacts. The other five are memorialized in three letters from Kurt A. Wimmer to William F. Caton (Oct. 25 and 29, 1993, and Nov. 2, 1993). These letters cite only ET Docket No. 93-266.

<sup>11</sup>Letter from Kurt A. Wimmer to William F. Caton (Oct. 25, 1993).

<sup>12</sup>The letter concerns contacts made on October 22 and October 23, 1993. See *id.* APC did not file its comments in ET Docket No. 266 until November 15, 1993, and filed its Request for Expedited Treatment on October 28, 1993.

KELLOGG, HUBER & HANSEN

Mr. Andrew S. Fishel

Page 5

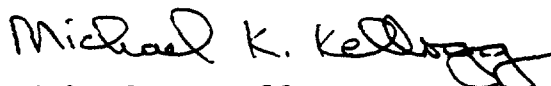
January 26, 1994

Expedition in which it stressed the benefits of its obtaining a pioneer's preference and introducing its particular service as soon as possible.<sup>13</sup>

The Commission has been diligent about ex parte contacts in these matters, repeatedly warning the parties about the strict requirements of its rules. See, e.g., 8 FCC Rcd at 7695; 7 FCC Rcd at 7813; Report and Order, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3493, 3500 n.9 (1991). Indeed, confronted by apparent confusion regarding those rules, the Commission clarified them in February of 1993, warning the parties that "[f]ailure to comply with the ex parte rules in the future could result in . . . [the] imposition of sanctions." Ex Parte Presentations Relating to 2 GHz Personal Communications Services' Pioneer's Preference Requests, 8 FCC Rcd 1511 (1993).

I thank you in advance for your time and attention.

Yours sincerely,



Michael K. Kellogg

cc: Brian F. Fontes  
Randall Coleman  
Byron F. Marchant  
Karen Brinkmann  
Robert Pepper  
Thomas Stanley  
William Kennard  
All Parties in ET Dkt. No. 93-266  
and Gen. Dkt. No. 90-314

---

<sup>13</sup>American Personal Communications, Inc., Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, Review of the Pioneer's Preference Rules, ET Docket No. 93-266, at 8-9 (Oct. 28, 1993). To our knowledge, this request was not served on the parties in either ET Docket No. 93-266 or those in Gen. Docket No. 90-314.

Certificate of Service

I, Michael K. Kellogg, certify that on this 26th day of January, 1994, I caused copies of the foregoing Letter to Andrew S. Fishel to be served by first class mail, postage prepaid, on the parties on the attached service list.

Michael K. Kellogg  
Michael K. Kellogg

APPENDIX C

KELLOGG, HUBER & HANSEN

1301 K STREET, N.W.  
SUITE 305 EAST  
WASHINGTON, D.C. 20005  
—  
(202) 371-2770

MICHAEL K. KELLOGG  
PETER W. HUBER  
MARK C. HANSEN

FACSIMILE:  
202-371-2791

February 23, 1994

BY HAND DELIVERY

William Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, Room 222  
Washington, D.C. 20554

Re: ET Docket No. 93-266, Review of the Pioneer's  
Preference Rules; Gen. Docket No. 90-314, Amendment of  
the Commission's Rules to Establish New Personal  
Communications Services

Dear Mr. Caton:

Enclosed are ten copies of a letter written to Mr. Andrew S. Fishel for inclusion in the record in the above-captioned proceedings. Please return a date-stamped copy to the person delivering them. Copies have been served on all parties to the proceedings.

Sincerely,

Michael K. Kellogg  
Michael K. Kellogg

Enclosures



KELLOGG, HUBER & HANSEN

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202-371-2791

February 23, 1994

Mr. Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
1919 M Street, NW -- Room 852  
Washington, D.C. 20554

Re: ET Docket No. 93-266, Review of the Pioneer's Preference Rules; Gen. Docket No. 90-314, Amendment of the Commission's Rules to Establish New Personal Communications Services

Dear Mr. Fishel:

On January 26, 1994, I submitted a letter on behalf of Pacific Bell informing you that Pacific Bell had reason to believe that certain parties had violated the Commission's ex parte rules. All three parties mentioned in my letter -- American Personal Communications ("APC"), Omnipoint Communications, Inc. ("Omnipoint"), and Cox Enterprises, Inc. ("Cox") -- have now responded. Unfortunately, a reply is required to clarify the record.

APC has made a number of accusations against Pacific Bell. These accusations have nothing to do with the issue in my letter, which is whether there were improper ex partes. But the accusations nonetheless must be answered.

APC begins its letter by asserting that Pacific Bell is bent on "imped[ing] competition and new PCS services through regulatory delay and abuse of legal process;"<sup>1</sup> Cox levels a similar accusation.<sup>2</sup> The record demonstrates that those accusations are untrue. Pacific Bell has been steadfast in its support of the

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<sup>1</sup>Letter from Jonathan D. Blake & Kurt A. Wimmer to Andrew S. Fishel 1 (Feb. 4, 1994) ("APC Letter").

<sup>2</sup>Letter from Mark J. Tauber to Andrew S. Fishel 6 (February 4, 1994) ("Cox Letter").